



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Stay, Inc.
File: B-237073.2
Date: February 26, 1990

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.
Richard L. Spees, Esq., Heron, Burchette, Ruckert & Rothwell, for the interested party, American Mutual Protective Bureau.
Janet N. Repka, Esq., Department of Defense, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

Protest that bid bond was defective due to corporate surety's failure to name federal process agents is denied because such failure is a procedural omission that does not bear directly on the authority of the surety to issue the bond or affect the underlying obligation of the surety.

DECISION

Stay, Inc., protests the award of a contract by the Real Estate and Facilities Directorate, Washington Headquarters Services (WHS), Department of Defense, to American Mutual Protective Bureau (AMPB) under invitation for bids (IFB) No. MDA946-89-C-0041, for security guard services at the Army Materiel Command Building in Alexandria, Virginia.

We deny the protest.

Stay initially protested the award to AMPB on the ground that WHS improperly accepted AMPB's bid bond because AMPB's surety, Merchants Bonding Company, was not listed in Treasury Circular 570 as licensed in Virginia, the state where the contract is to be performed. Treasury Circular 570, published annually, is the Treasury Department's list of sureties approved to provide bonds to the government. We denied the protest because the Treasury Circular, on its

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face, states that a surety need not be licensed in the state of contract performance. Accordingly, we held that the contracting officer acted appropriately in accepting AMPB's otherwise properly executed bid bond. Stay, Inc., B-237073, Dec. 22, 1989, 89-2 CPD ¶ 586. Stay also argued that to the extent Treasury Circular 570 permitted acceptance of bonds from sureties not licensed in the state where the contract is to be performed, the Treasury Circular itself is improper. We declined to consider this issue as it is a matter for the Treasury Department or the courts, not our Office, to resolve.

Stay now raises an additional basis for challenging award to AMPB, contending that AMPB's bid bond was defective because Merchants Bonding Company had not appointed federal process agents as required by Treasury Circular 570.^{1/} According to Stay, failure to appoint federal process agents in the districts where required by the time of bid opening renders the bid bond defective and the bid nonresponsive. We do not agree.

The Secretary of the Treasury is required by statute to authorize corporations to provide surety bonds to the government. See 31 U.S.C. §§ 9304-9308 (1982). Companies so authorized are included on a list published annually in Treasury Circular 570. 31 C.F.R. § 223.16 (1989). Corporations providing bid bonds to the government must appear on this list of approved sureties, and must operate within the limits set forth therein. Federal Acquisition Regulation (FAR) § 28.202-1(a).

One of the requirements set forth in Treasury Circular 570, as well as in statute and regulation, is that sureties providing bonds to the government must appoint federal process agents in certain districts. Specifically, this requirement, found at note (d) at the end of the Treasury Circular, states in relevant part:

"FEDERAL PROCESS AGENTS: Treasury approved surety companies are required to appoint Federal process agents in accord with 31 U.S.C. 9306 and 31 CFR 224 in the following districts: Where the principal

^{1/} Although Stay characterizes its current challenge to the award to AMPB as a request for reconsideration of our prior decision, it in fact constitutes a new protest, since Stay does not challenge the rationale on which our prior decision is based and instead raises a new ground of objection to the award.

resides; where the obligation is to be performed; and in the District of Columbia where the bond is returnable or filed. . . ."

The bid guarantee required by the IFB in this case was to be executed on Standard Form (SF) 24, Bid Bond. See FAR § 53.301-24. As explained in our prior decision, the instructions for completing SF 24, printed on the face of the form, provide that "[c]orporations executing the bond as sureties must be among those appearing on the Treasury Department's list of approved sureties and must be acting within the limits set forth therein." (Emphasis added.) Stay argues that noncompliance with the requirement to appoint federal process agents in the required districts--i.e., where the contract is to be performed, where the principal resides, and the District of Columbia--constitutes failure to act within the limits set forth in the Treasury Circular, and renders a bid bond defective. Specifically, Stay contends that since AMPB's surety failed to appoint federal process agents in Virginia (where the contract is to be performed), California (where AMPB resides), and the District of Columbia, the bid bond was defective and AMPB's bid should have been rejected.

A bid guarantee is a firm commitment from a bidder that if its bid is accepted it will execute the contractual documents and provide the payment and performance bonds required in the contract. See FAR § 28.101. Its purpose is to secure the surety's liability in the event the bidder fails to honor its bid in these respects. Leeth Constr., Ltd., B-236275, Nov. 13, 1989, 69 Comp. Gen. _____, 89-2 CPD ¶ 454. Thus, we have repeatedly held that a bid bond is defective, rendering a bid nonresponsive, if it is not clear that the bond will bind the surety. All Star Maintenance, Inc., B-234820, Mar. 24, 1989, 89-1 CPD ¶ 305. On the other hand, when a required bid bond is found to be proper on its face, the bond is acceptable. Contract Servs. Co., Inc., B-226780.3, Sept. 17, 1987, 87-2 CPD ¶ 263. Specifically, where a corporate surety is designated, a bid bond is proper "on its face" when it has been duly executed by the surety's agent, the surety has agreed to be obligated for the penal amount of the bond, and the surety appears on the Treasury Circular list of acceptable sureties. See Siska Constr. Co., Inc., B-218428, June 11, 1985, 85-1 CPD ¶ 669, aff'd, B-218428.2, July 29, 1985, 85-2 CPD ¶ 102.

Given the above requirements, upon receiving a bid accompanied by a bid bond from a corporate surety a contracting officer must first determine whether the surety is obligated to the government for the amount of the bond. This obligation must be clear from the face of the bond--i.e.,

the instrument itself must create the necessary and intended obligation. The contracting officer must then ascertain that the surety is authorized to provide bonds to the federal government, and that the surety is acting within the limits of that authorization.

In this case, Treasury Circular 570 contained the following entry for Merchants Bonding Company:

"Merchants Bonding Company (Mutual). BUSINESS ADDRESS: 2100 Grand Avenue, Des Moines, IA. 50312. UNDERWRITING LIMITATION b/: \$480,000. SURETY LICENSES c/: AZ, CA, CO, FL, IA, KS, MI, MN, MO, NE, NV, NM, OK, PA, TX, WA. INCORPORATED IN: Iowa."

After determining that the bid bond itself was properly executed, the contracting officer then reviewed the authority of the proposed surety to provide bonds to the government. Using the information in the Treasury Circular entry set forth above, the contracting officer determined that Merchants Bonding Company had been approved by Treasury to issue bonds, that it had not exceeded its underwriting limit established in the Circular, and that it was licensed as a surety in the states in which it was required to be licensed. Thus, the contracting officer concluded that the bid bond was properly executed and was submitted by an approved corporate surety acting within the limits set forth in Treasury Circular 570.

Stay contends that the contracting officer must go further and also ascertain whether a corporate surety has complied with the requirement to appoint federal process agents. According to Stay, this requirement is another limitation on the authority of corporate sureties, much like the limit established on the maximum dollar amount for which a corporate surety may provide a bond. We do not agree that a surety's failure to comply with the requirement for appointment of federal process agents in certain districts renders the bond defective.

First, the requirement to appoint federal process agents in certain districts does not bear directly on the authority of the surety to issue a bond, as do the other limitations in the Circular, such as a surety's inability to provide a valid bid bond in excess of its underwriting limitation, or to execute a bond in states where it does not hold a surety license. Further, and more importantly, an approved surety's failure to appoint federal process agents does not alter that surety's obligation under an otherwise valid bid bond: such a surety cannot renounce its obligation, and

cannot refuse to honor its contractual commitment. Accordingly, in our view, noncompliance with this requirement constitutes a procedural omission that does not render the bid bond defective and can be corrected after bid opening, as AMPB's surety has done here.

In addition, Stay's position would create an inappropriate role for the contracting officer in reviewing the acceptability of corporate sureties. We have long recognized that the Treasury Department has a statutory mandate to oversee approval of corporate sureties. See 52 Comp. Gen. 184 (1972). In fulfilling its statutory mandate, Treasury routinely reviews detailed information about corporate sureties; after making an initial determination of acceptability, Treasury includes the surety on its published list of approved sureties, Treasury Circular 570. Contracting officials are able to review the face of the bid bond and compare the particulars of the bond with the limits set forth in the Treasury Circular. Requiring contracting officials to look beyond the face of the bond and the information provided in the Treasury Circular defeats the purpose of compiling and distributing the Circular: to provide contracting officials with a tool for ascertaining the authority of corporate sureties. The Treasury Department is charged with granting such authority and with ensuring ongoing compliance with the applicable statutes and regulations. We do not think it is appropriate to shift that responsibility to contracting officers.

We therefore continue to view the award to AMPB as proper and deny this protest. However, we have, by separate letter, forwarded a copy of this decision to the Secretary of the Treasury for whatever review deemed appropriate.

The protest is denied.

for *Seymour E. Hinchman*
James F. Hinchman
General Counsel